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No. 93-2053

In the Supreme Court of the United States

OCTOBER TERM, 1994

ENPLANAR, INC., ET AL., PETITIONERS

v.

TOGO WEST, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' request for an injunction directing the Army Corps of Engineers to award particular contracts to them under Section 8(a) of the Small Business Act, 15 U.S.C. 637(a) (1988 & Supp. IV 1992), is precluded by 15 U.S.C. 634(b)(1).

2. Whether the district court lacked jurisdiction over petitioners' claim against the Corps for an unspecified amount of monetary damages.

3. Whether the district court committed a series of procedural errors that violated procedural due process.

4. Whether the Corps' suspension of its Section 8(a) program deprived petitioners of property without due process of law.

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OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. A1-A41) is reported at 11 F.3d 1284. The second opinion of the court of appeals (Pet. App. A42-A51) is unreported. The opinions and orders of the district court (Pet. App. A52-A95) are not yet reported.

JURISDICTION

The first judgment of the court of appeals was entered on January 19, 1994. A petition for rehearing was denied on March 14, 1994. Pet. App. A96. The second judgment of the court of appeals was entered on June 2, 1994. The petition for a writ of certiorari was filed on June 13, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a challenge to the way in which the Army Corps of Engineers has administered its program for assisting socially and economically disadvantaged businesses in obtaining government contracts under Section 8(a) of the Small Business Act, 15 U.S.C. 637(a)(1988 & Supp. IV 1992). Initially, the Corps employed a practice of setting aside 100% of its small business contracts for minority businesses. In November, 1990, a group of nonminority contractors successfully challenged that practice. The Corps then sought legal advice from Army Headquarters concerning the overall legality of the Section 8(a) program. While awaiting that advice, the Corps refrained from awarding any new contracts under the program. On January 22, 1994, the Corps received advice from Army Headquarters that, while the 100% set aside was erroneous, there was no legal impediment to awarding contracts under the Section 8(a) program. The Corps then lifted its suspension of the program. Pet. App. A4-A6.

Meanwhile, on January 8, 1991, petitioners EJA, Enplanar, Dragon, and Keeler filed suit in the United States District Court for the Eastern District of Louisiana against the Corps, its officials, and the Small Business Administration (SBA). At the time they filed suit, petitioners were certified participants in the Section 8(a) program. Petitioners, who are minority contractors, alleged that the Corps' suspension of the Section 8(a) program discriminated against them on the basis of race, in violation of 42 U.S.C. 1981, 1985(3), and 2000d, and also constituted a taking of property without due process. Pet. App. A7. Petitioners also specifically challenged the Corps' failure to include the Southwest Pass project in Louisiana and the Cotton Meade project

in Mississippi in the Section 8(a) program. Petitioners sought declaratory and injunctive relief, including an injunction lifting the suspension of the Section 8(a) program and directing the Corps to award the Southwest Pass project to EJA and the Cotton Meade project to Keeler. Pet. App. A7-A8. Petitioner Keeler also sought an unspecified amount of damages resulting from its failure to receive the Cotton Meade project. *Id.* at A79.

The district court issued a preliminary ruling that injunctive relief was not available against the Corps because an injunction against the Corps would affect the SBA and injunctive relief against the SBA is precluded by 15 U.S.C. 634(b)(1). The court later determined that the Corps' resumption of its Section 8(a) program had mooted all claims for injunctive relief. Pet. App. A57-A58.

At that point, the government moved to transfer Keeler's claim concerning the Cotton Meade project to the Southern District of Mississippi and for summary judgment on all other claims. Petitioners then filed an amended complaint against two Corps officials alleging that their refusal to meet with petitioners during the pendency of the suit constituted unconstitutional retaliation. The government filed a supplemental memorandum addressing that claim. In accordance with the government's motion, the district court granted summary judgment against petitioners on all claims except Keeler's claim concerning the Cotton Meade project. The court transferred that claim to the Southern District of Mississippi. Pet. App. A9-A10.

The court of appeals affirmed. Pet. App. A1-A41. The court held that the district court had properly denied petitioners' request for an injunction directing the Corps to award the Southeast Pass and Cotton Meade projects to EJA and Keeler. The court explained that 15

U.S.C. 634(b) "precludes injunctive relief against the SBA," and that "[w]e . . . will not allow the contractors to obtain indirectly (against the Army) what they cannot obtain directly (against the SBA)." Pet. App. A12 (quoting *Valley Constr. Co.* v. *Marsh*, 714 F.2d 26, 29 (5th Cir. 1983)). The court added that "[i]f a court ordered the Corps to award these projects to specific 8(a) participants, this order would also require injunctive relief concerning the SBA's conduct as to its statutory duties regarding its selection of 8(a) contractors for a specific project, and its subsequent negotiations with a procurement agency concerning the terms of the project's contract." Pet. App. A12 n.5.

The court further held that EJA was not entitled to injunctive relief because it "no longer exists, and therefore it cannot perform the contract." Pet. App. A14 n.7. The court also concluded that EJA was not entitled to "money damages in lieu of the injunctive relief" because "[t]o allow such a result would destroy the distinction between monetary and equitable damages." *Ibid.* Moreover, "since EJA's claim concerning the Southwest Pass project names only the Corps and its divisions as defendants, it is thereby suing only the United States." *Ibid.* Such a monetary claim against the United States, the court held, should have been brought in the Court of Federal Claims. *Ibid.*

The court next rejected petitioners' contention that they were improperly denied discovery on their non-injunctive claims. The court found that petitioners had failed to explain how their requested discovery "would or could create a fact issue to overcome the * * * summary judgment motion." Pet. App. A20. The court also rejected petitioners' claim that they had lacked notice that the government was seeking summary judgment on the retaliation claim. The court noted that the govern-

ment's supplemental memorandum had, in fact, specifically addressed that claim. *Id.* at A21-A22.

The court then held that summary judgment was properly granted on the non-injunctive claims. The court found that the Corps had suspended the Section 8(a) program out of a concern that it might be unconstitutional. The court concluded that petitioners had failed to produce evidence "that the [Corps'] proffered reasons were a mere pretext for discrimination." Pet. App. A28-A29. The court also concluded that evidence that the Corps did not include Southwest Pass project in the Section 8(a) program because it "feared that too many of its small business set-asides were going into the 8(a) program" was insufficient to show "that the Corps' decision not to submit the project was based on a discriminatory intent." *Id.* at A31 n.14.

Finally, the court determined that the contracting officers' refusal to speak to petitioners during the pendency of the suit was not intended to "punish them for having brought suit." Pet. App. A35. Instead, the court found that the Army's General Counsel had directed the officers not to speak with petitioners so as not to give them "any ammunition to weaken the Government's [litigation] position." *Ibid.* Although petitioners attacked as hearsay the evidence that the officials had relied on such instructions, petitioners did not raise that objection in the district court. *Id.* at A35 n.17. Accordingly, the court concluded that "the error, if any, is waived." *Ibid.*

2. While petitioners' appeal was pending in the Fifth Circuit, the District Court for the Southern District of Mississippi dismissed Keeler's claim for unspecified money damages related to the Cotton Meade project. Pet. App. A77-A85. The court noted that, while the Tucker Act gives district courts jurisdiction of claims

against the United States for $10,000 or less, the Court of Federal Claims has exclusive jurisdiction of claims for more than $10,000. Pet. App. A82. Because plaintiffs bear the burden of establishing jurisdiction and Keeler had failed to specify the amount of its damages, the court concluded that it lacked jurisdiction over Keeler's claim. *Id.* at A82-A84.

The district court also denied Keeler leave to file a second amended complaint seeking injunctive relief. The court held that such relief is precluded by 15 U.S.C. 634(b)(1). The court also determined that such relief "would be meaningless" since Keeler "has no[w] acknowledged that it has ceased all business operations and does not contend that it is capable of performing construction contracts of any kind." Pet. App. A87.

The court of appeals affirmed. Pet. App. A42-A51. It held that the district court properly dismissed Keeler's claim for monetary damages for lack of jurisdiction. *Id.* at A45-A48. Because petitioner had failed to specify the amount of its damages, the court held, the district court lacked jurisdiction under the Tucker Act. Nor was jurisdiction available under 15 U.S.C. 634(b) or 5 U.S.C. 702. The court noted that "15 U.S.C. 634(b) provides jurisdiction for claims against the Small Business Administration, an entity which is not a defendant here." Pet. App. A47. Section 702 did not provide jurisdiction, the court held, because Keeler made no claim under the Administrative Procedure Act and because Section 702 does not authorize monetary damages. Pet. App. A47-A48.

The court also rejected Keeler's contention that the district court erred in denying its request for additional discovery. The court explained that Keeler had "never identified any specific discovery needed to respond to the motion to dismiss." Pet. App. A49. Finally, the court

concluded that the district court did not abuse its discretion in refusing to allow Keeler leave to amend its complaint. The court noted that the claims in Keeler's amended complaint were "nearly identical" to the claims it had unsuccessfully litigated in the Eastern District of Louisiana. *Id.* at A49-A51.

ARGUMENT

1. Petitioners contend (Pet. 19-22) that the court of appeals erred in concluding that 15 U.S.C. 634 precluded their request for an injunction requiring the Corps to award the Southwest Pass project to EJA and the Cotton Meade project to Keeler. Section 634 expressly provides, however, that "no attachment, *injunction*, garnishment, or other similar process, mesne or final, shall be issued against the Administrator [of the Small Business Administration]." 15 U.S.C. 634(b)(1) (emphasis added). Although petitioners sought an injunction against the Corps and not the SBA, the court of appeals concluded that Section 634 did not permit petitioners to obtain indirectly against the Corps what they could not obtain directly against the SBA. Pet. App. A12. The court also concluded that if petitioners were to obtain an injunction against the Corps, "this order would also require injunctive relief concerning the SBA's conduct." *Id.* at A12 n.5.

Petitioners contend (Pet. 17, 19-21) that the court's holding that Section 634 precluded their claim for injunctive relief is inconsistent with the decisions in *Cavalier Clothes, Inc.* v. *United States*, 810 F.2d 1108, 1112 (Fed. Cir. 1987), *Ulstein Maritime, Ltd.* v. *United States*, 833 F.2d 1052, 1057 (1st Cir. 1987), and *Oklahoma Aerotronics* v. *United States*, 661 F.2d 976, 977 (D.C. Cir. 1981). There is, however, no conflict warranting this Court's review.

In *Cavalier Clothes*, the Federal Circuit held that the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 40, authorizes injunctive relief against the SBA. 810 F.2d at 1112. That Act, however, only applies to cases brought in the Court of Claims. 28 U.S.C. 1491(a)(1) (1988 & Supp. 1992). In *Ulstein Maritime, Ltd.*, plaintiffs sought an injunction against the Navy rather than the SBA. The court held that, given the particular issue involved in that case, interpreting Section 634(b)(1) to preclude such relief would have rendered a provision in the Walsh-Healy Act meaning-less. 833 F.2d at 1055. The court's further conclusion (*id.* at 1056-1058) that Section 634 does not preclude an injunction against the SBA in all circumstances was therefore unnecessary to its decision. Finally, in *Oklahoma Aerotronics*, the D.C. Circuit held that because plaintiffs were simply seeking a determination that the SBA's conduct was arbitrary and capricious under the Administrative Procedure Act, the argument that Section 634 precludes injunctive relief against the SBA was "irrelevant." 661 F.2d at 977.

In any event, the question whether Section 634 precluded the injunctive relief sought by petitioners is no longer presented. Petitioners EJA and Keeler are out of business and unable to perform any contracts. Pet. App. A14 n.7, A87-A89. Moreover, the Southwest Pass and Cotton Meade projects have been fully performed. Pet. 3, 17. In those circumstances, petitioners' request for injunctive relief is moot. See *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70 (1983) (mootness doctrine requires a litigant to have "suffered some actual injury that can be redressed by a favorable judicial decision").

2. Petitioners argue (Pet. 22-25) that the court of appeals erred in concluding that the district court lacked

jurisdiction over their claims for unspecified monetary damages. As the court of appeals concluded, however, the Tucker Act only provides district courts with jurisdiction of claims against the United States for $10,000 or less. The Court of Federal Claims has exclusive jurisdiction of claims under the Tucker Act for more than $10,000. 28 U.S.C. 1346(a)(2), 1491(a). Because petitioners did not allege that their losses amounted to $10,000 or less, the district court lacked jurisdiction under the Tucker Act.

Petitioners contend that because they had "an alternative method of obtaining jurisdiction and waiver of sovereign immunity," they should not have been remitted to the Court of Federal Claims. Pet. 22. Petitioners do not specify, however, what that alternative source of district court jurisdiction is. In the court of appeals, petitioners relied on 15 U.S.C. 634(b) and 5 U.S.C. 702 for that purpose. As the court of appeals concluded, however, neither of those provisions is applicable here. Section 634(b) provides jurisdiction over claims against the SBA, but petitioners seek damages from the Corps, not from the SBA. Waivers of sovereign immunity must be narrowly construed and apply only to suits against the specific entity whose immunity is waived. See *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). And because the Administrative Procedure Act does not authorize a claim for monetary damages, 5 U.S.C. 702 is also inapplicable. Pet. App. A47-A48.

Petitioners' inability to establish a source of jurisdiction for their claim other than the Tucker Act distinguishes this case from the cases upon which they rely. See Pet. 23-25. For example, in *Munoz* v. *SBA*, 644 F.2d 1361, 1364 (9th Cir. 1981), plaintiffs sought monetary relief from the SBA. The district court there-

fore had jurisdiction under Section 634(b). In *Bowen* v. *Massachusetts*, 487 U.S. 879, 887, 893 (1988), plaintiffs asserted a claim under the Administrative Procedure Act and did not seek monetary damages. The district court therefore had jurisdiction under 5 U.S.C. 702. 487 U.S. at 910 & n.48. Because plaintiffs are unable to identify a source of jurisdiction for their claim other than the Tucker Act, *Munoz* and *Bowen* (as well as all the other cases relied upon by petitioners) are inapposite.

3. Petitioners' contention (Pet. 26-35) that the district court committed a series of procedural errors that denied them due process of law is also without merit. Petitioners argue that the district court improperly denied them discovery. Pet. 26-27. But, as the court of appeals concluded, petitioners never explained to the district court how the discovery they sought would assist them in answering the government's dispositive motions. Pet. App. A20, A49. Although petitioners assert (Pet. 28) that they never received notice of the government's motion for summary judgment on their first amended complaint, the government's supplemental memorandum in support of its motion for summary judgment provided petitioners with ample notice. Pet. App. A21-A22. Petitioners' contention that the district court improperly relied on hearsay in granting summary judgment on their retaliation claim (Pet. 29-30) was not raised in the district court. The court of appeals therefore correctly concluded that petitioners had waived the objection. Pet. App. A35 n.17. Finally, while petitioners fault the Mississippi district court for failing to grant Keeler's motion to amend its complaint (Pet. 34-35), the claims in the proposed amendment were nearly identical to the

claims that petitioners had litigated unsuccessfully in Louisiana. Pet. App. A49-A51.

4. Finally, petitioners argue that the Corps' suspension of the Section 8(a) program, without notice and a hearing, unlawfully deprived them of property without due process of law. Pet. 36-37. As the court of appeals held, however, the Small Business Act and the applicable regulations vest the Small Business Administration and the procurement agency with absolute discretion to submit or withdraw a particular project from the program. Pet. App. A2-A3; 15 U.S.C. 637(a)(1)(A); 48 C.F.R. 19.800(c), 19.803(a)-(c), 19.804. Accordingly, petitioners did not have a property interest in the Section 8(a) program that was protected by the Due Process Clause. *Board of Regents* v. *Roth*, 408 U.S. 564, 577-578 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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